

Appealed

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CITY OF SEATTLE,
DEPARTMENT OF WATER,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 79-165

ORDER GRANTING
MOTION TO DISMISS

Respondent, Department of Ecology, filed a Motion to Dismiss the above-entitled matter on the grounds that this Board lacked jurisdiction over the subject matter of the appeal. The matter was submitted to the full Board by briefs and oral argument on March 17, 1980, in Seattle. Appellant was represented by Arthur Lane, Assistant City Attorney; respondent was represented by Wick Dufford, Assistant Attorney General.

Having considered the motion, the briefs in support and in

1 opposition thereto, and the files and records herein, the Board
2 concludes that the Motion to Dismiss should be granted.

3 We have carefully searched chapter 43.21A RCW, chapter 43.21B RCW
4 and chapter 34.04 RCW for a clear, unambiguous grant of jurisdiction
5 to the Pollution Control Hearings Board to determine the validity of
6 rules adopted by the Department of Ecology, but have been unable to
7 find it.

8 The contention of the city that the Board does have jurisdiction
9 is based on the assumption that RCW 34.04.070¹ is not dispositive of
10 the matter. Contrary to the position of the city, this statute is
11 dispositive of the issue of jurisdiction. It clearly states that
12 other than the promulgating agency, only the Thurston County Superior
13 Court has jurisdiction to determine the validity of a rule. The
14 holding of the supreme court in Sim v. Washington State Parks and
15 Recreation Commission, 90 Wn.2d 378 (1978) confirms that this is so
16 even though the statute uses the permissive word "may."

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19 1. The APA provides for the determination of the validity of any
20 rule in RCW 34.04.070:

- 21 (1) The validity of any rule may be determined upon
22 petition for a declaratory judgment thereon
23 addressed to the superior court of Thurston county,
24 when it appears that the rule, or its threatened
25 application, interferes with or impair, the legal
26 right or privileges of the petitioner. The agency
27 shall be made a part to the proceeding. The
declaratory judgment may be rendered whether or not
the petitioner has first requested the agency to
pass upon the validity of the rule in question.

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Unless a later legislative act expressly negates it,² the positive grant of jurisdiction to the Thurston County Superior Court set forth in the Administrative Act (APA) effectively answers the contention of the city that jurisdiction resides in the Board. RCW 34.04.940.

We can find no express provision superceding or modifying RCW 34.04.070 in either chapter 43.21A RCW which established the Department of Ecology or chapter 43.21B RCW which established the Pollution Control Hearings Board. RCW 43.21A and RCW 43.21B were both enacted together in chapter 62 of the laws of 1970, Ex. Sess.

The city contends that jurisdiction to determine the validity of rules adopted by the Department of Ecology is conferred on the Pollution Control Hearings Board by RCW 43.21B.130.³ We find

2. RCW 34.04.940 provides in part:

"No subsequent legislation shall be held to supercede or modify the provisions of the administrative procedure act or its applicability to any agency except to the extent that such legislation shall do so expressly."

3. RCW 43.21B.130 provides:

The administrative procedure act, chapter 34.04 RCW, shall apply to the appeal of rules and regulations adopted by the board to the same extent as it applied to the review of rules and regulations adopted by the directors and/or boards or commissions of the various departments whose powers, duties and functions are transferred by this 1970 act to the department. All other decisions and orders of the director and all decisions of air pollution control boards or authorities established pursuant to chapter 70.94 RCW shall be subject to review by the hearings board as provided in this 1970 act.

1 43.21B.130 to be highly ambiguous and confusing. It falls far short
2 of providing the express language required by RCW 34.04.940 to
3 supercede or modify provisions of the APA.

4 We are puzzled by the wording of RCW 43.21B.130, and are inclined
5 to agree with respondent that in all probability a drafting error was
6 made during the legislative process, which resulted in "board" being
7 erroneously substituted for "director" in the first sentence. We
8 agree that the only way the section can be read coherently is to
9 substitute "director" for "board," so that the sentence would read:

10 The administrative procedure act, chapter 34.04
11 RCW, shall apply to the appeal of rules and
12 regulations adopted by the director to the same
13 extent as it applied to the review of rules and
14 regulations adopted by the directors and/or boards
or commissions of the various departments whose
powers, duties and functions are transferred by
this 1970 act to the department.

15 However, it is not necessary to assume that such a drafting error
16 was made during the legislative process in order to support the
17 conclusion we have reached.

18 It was logical for the legislature to leave the determination of
19 the validity of agency rules with the superior court of Thurston
20 county as provided in the APA, since such a determination is to be made
21 on narrow legal grounds. A rule can be declared invalid only if it
22 violates constitutional provisions or exceeds the statutory authority
23 of the agency or was adopted without compliance with statutory rule
24 making procedures. The legislature undoubtedly felt that such
25 strictly legal determinations could better be made by the court than
26 the Pollution Control Hearings Board whose special expertise lies more

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1 in the technical aspects of the environment than in the technical
2 aspects of constitutional and statutory law.

3 For the foregoing reasons, the appeal by the City of Seattle
4 should be dismissed. NOW THEREFORE,

5 IT IS ORDERED that respondent's Motion to Dismiss is granted and
6 the appeal by the City of Seattle is dismissed.

7 DONE this 12th day of June, 1980.

8
9 POLLUTION CONTROL HEARINGS BOARD

10 Nat W. Washington
11 NAT W. WASHINGTON, Chairman

12 David Akana
13 DAVID AKANA, Member

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15 CHRIS SMITH, Member
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